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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 885

CHARLES E. WILLIAMS, *Petitioner*,

v.

HOT SHOPPES, INC., *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINON BELOW

The opinion below reported at 110 U.S. App. D.C. 358 and 293 F. 2d 835 is printed as an appendix to the Petition for the Writ of Certiorari.

JURISDICTION

The judgment sought to be reviewed was entered on April 20, 1961 and amended on May 22, 1961. The petition herein was not timely filed, therefore, and this Court lacks jurisdiction to grant the petition.

QUESTIONS PRESENTED

1. Whether the petition herein is timely filed so that this Court has jurisdiction to grant certiorari.

2. Whether the order appealed to the Court of Appeals, which is the subject of the Petition for a Writ of Certiorari herein, was a final order and, therefore, properly appealable to the Court of Appeals and properly a subject for a Petition for a Writ of Certiorari.

3. Whether the Civil Rights Act of 1875 is of any present validity with respect to this case.

STATUTES INVOLVED

28 U.S.C. §2101(c):

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil aciton, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.":

Rule 54(b) of the *Federal Rules of Civil Procedure*:

> "(b) judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however desig-

> nated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. As amended April 17, 1961, eff. July 19, 1961."

and the Act of March 1, 1875, c. 114, 18 Stat. 336, 1 Supp. to Rev. Stat. 148 (1874-1881), 1 Supp. to Rev. Stat. 67 (1874-1891), which is set forth in the Petition at pp. 3-4.

STATEMENT

On November 25, 1959, petitioner, Charles E. Williams, filed in the United States District Court for the District of Columbia, a complaint in Civil Action No. 3332-59. This Complaint contained two claims for relief.[1] The first claim was based upon 42 U.S.C. § 1983 and petitioner demanded judgment of $5,000 for the alleged violation thereof. The second claim (also contained in paragraph 9 of the Complaint) demanded a $500 statutory penalty and was based upon Sections 1 and 2 of the Civil Rights Act of 1875.

On December 14, 1959, respondent filed a Motion to Dismiss said Complaint.

On January 27, 1960, the United States District Court for the District of Columbia granted the Motion to Dismiss the Complaint in its entirety. Both the $5,000 and the $500 claims, were, therefore, dismissed.

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[1] These claims were not set forth in separate counts, and so, for convenience and clarity, may hereafter be referred to as the $5,000 claim and the $500 claim.

Petitioner then appealed the dismissal of the Complaint to the United States Court of Appeals for the District of Columbia Circuit. On April 20, 1961, that Court, sitting en banc, reversed the dismissal of the $5,000 claim based upon 42 U.S.C. § 1983 and that cause was remanded to the District Court. The dismissal of the claim for the statutory penalty under the Civil Rights Act of 1875, however, was affirmed unanimously. Judges Bazelon and Edgerton dissented with respect to the $5,000 claim based upon 42 U.S.C. § 1983, but joined the majority in affirming the dismissal of the $500 claim. *Williams* v. *Hot Shoppes, Inc.*, 110 U.S. App. D.C. 358; 293 F. 2d 835.

The petitioner thereupon filed in the United States District Court for the District of Columbia, a Motion for Leave to Amend the Complaint. This Motion was granted on June 5, 1961. Petitioner then filed the Amended Complaint and, in so doing, not only modified the theory of his claim under 42 U.S.C. § 1983, but also reinserted the claim for the statutory penalty of $500, based upon the Civil Rights Act of 1875. This latter claim was identical to the one which had been dismissed, and the dismissal affirmed unanimously as described above.

Respondent then filed a Motion for Summary Judgment with respect to the entire Amended Complaint. On August 17, 1961, the United States District Court for the District of Columbia denied respondent's Motion for Summary Judgment with respect to the $5,000 claim based upon 42 U.S.C. § 1983,[2] but granted the

[2] On Page 4A of his Petition, in the Appendix, petitioner erroneously states that the claim for damages under 42 U.S.C. § 1983 was dismissed by the District Court on remand. This is not accurate. The claim remains in the District Court following a denial of respondent's Motion for Summary Judgment.

Motion for Summary Judgment with respect to the $500 claim based upon the Civil Rights Act of 1875. Petitioner then appealed the dismissal of the $500 claim even though the District Court did not file a statement under Rule 54(b) of the *Federal Rules of Civil Procedure*, which was necessary to make the dismissal of the $500 claim final, and even though the $5,000 claim based upon the alleged violation of 42 U.S.C. §1983 remained in the District Court awaiting trial.

Respondent then filed a Motion to Dismiss the appeal on two grounds: (1) That the order dismissing the $500 claim was not a final order under Rule 54(b); and (2) that the dismissal of the $500 claim had become the law of the case when on April 20, 1961 the Court of Appeals affirmed the dismissal of that claim and petitioner neither sought rehearing nor a writ of certiorari.

On November 17, 1961, the United States Court of Appeals for the District of Columbia Circuit issued the following order:

> "Upon consideration of appellee's motion to dismiss, appellant's opposition, and of appellee's reply, it is, ORDERED, by the Court that the Motion be granted and this appeal is hereby dismissed on the ground that the action of the District Court complained of in this appeal was consistent with the opinion of this Court in *Williams v. Hot Shoppes, Inc.*, Number 15,610, decided April 20, 1961, [110] U.S. App. D.C. [358], 293 F. 2d 835.
>
> Per Curiam."

Petitioner then sought a rehearing and the Petition for Rehearing was denied on March 12, 1962.

ARGUMENT

I

The Petition Is Not Timely Filed

The first question which presents itself is whether the petition for a writ of certiorari is timely filed so that this Court has jurisdiction.

It becomes obvious, respondent submits, from the above recitation of the history of this litigation, that the 90-day time period during which petitioner could seek a writ of certiorari began to run on April 20, 1961, when the Court of Appeals affirmed the dismissal of the $500 claim, and no rehearing was sought. Petitioner cannot extend the said 90-day period by reinserting the same claim in an amended complaint in the District Court, rather than filing a petition for a writ of certiorari.

The circumstances of this case are quite similar to those of *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U.S. 206, 97 L. Ed. 245, 73 S. Ct. 245 (1952). The Federal Trade Commission had issued a three part-order against Minneapolis-Honeywell. Part I dealt with § 5 of the Federal Trade Commission Act, Part II dealt with § 3 of the Clayton Act and Part III with §2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The United States Court of Appeals for the Seventh Circuit reversed the Commission with respect to Part III. The opinion stated that since Minneapolis-Honeywell did not "challenge Parts I and II of the order based on the first two counts of the Complaint, we shall make no further reference to them."

The Federal Trade Commission did not petition for rehearing, but, after the time to seek rehearing had expired, filed a memorandum with the Court stating:

"On July 5, 1951, the Court entered its opinion and judgment reversing Part III of the decision of the Federal Trade Commission dated January 14, 1948 and dismissing Count III of the Complaint upon which it is based. No disposition has been made of the Cross-Petition filed by the Commission for affirmance and enforcement of the entire decision. The Commission takes the position that its Cross-Petition should be in part sustained, i.e., to the extent that the Court should make and enter herein a decree affirming Parts I and II of the Commission's order to cease and desist and commanding Minneapolis-Honeywell Regulator Company to obey the same and comply therewith.

"11. In its briefs filed herein, the petitioner abandoned its attack upon Parts I and II of the order and challenged only the validity of Part III of the order (see page 1 of petitioner's brief dated March 15, 1951). Thus, petitioner concedes the validity of Parts I and II of the order and does not contest the prayer of the Commission's Cross-Petition and brief with respect to the affirmance and enforcement of Parts I and II of the order."

Thereupon, the Court issued what it called a "Final Decree", again stating that Part III was reversed and affirming the Commission's order with respect to Parts I and II. The Federal Trade Commission then filed a petition for certiorari within 90 days of the second, or "final" decree of the Court of Appeals, but more than 90 days after the earlier decree of the Court of Appeals when it first reversed Part III and decided it needed to make "no further reference" to Parts I and II.

The Supreme Court held in Minneapolis-Honeywell that it had no jurisdiction to grant certiorari, as the

petition was not timely filed. The Court stated [211, 212]:

> "Thus, the mere fact that a judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.
>
> "The judgment of September 18, which petitioner now seeks to have us review, does not meet this test. It reiterated, without change, everything which had been decided on July 5. Since the one controversy between the parties related only to the matters which had been adjudicated on July 5, we cannot ascribe any significance, as far as timeliness is concerned, to the later judgment."

In the present case, the judgment of November 17, 1961, (rehearing denied on March 12, 1962), which petitioner now seeks to have reviewed, neither disturbed nor revised legal rights or obligations which, by its prior judgment of April 20, 1961, the Court of Appeals had settled with finality. The November 17, 1961 decision reiterated without change everything which had been decided on April 20, 1961.

As this Court has pointed out in many opinions, including *Federal Trade Commission* v. *Minneapolis-Honeywell*, supra, there must be an end to litigation. Petitioner should not be able to extend his time to petition for certiorari by reinserting the identical claim in

the same case, after its dismissal has been affirmed by the Court of Appeals.

Respondent respectfully submits that petitioner's petition for certiorari has not been timely filed and, for that reason, this Court lacks jurisdiction.

II

There Is No Final Order

The second question which presents itself is whether or not there is a final, appealable judgment or order present at all with respect to the $500 claim. Rule 54(b) of the *Federal Rules of Civil Procedure*, as amended, states:

> "(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, *the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. As amended April 17, 1961, effective July 19, 1961." (Emphasis supplied).

When the District Court, ruling on the amended complaint, granted the Motion for Summary Judgment

with respect to the $500 claim, it, at the same time, denied the motion with respect to the $5,000 claim. The $5,000 claim now awaits trial on the merits in the United States District Court for the District of Columbia. There being no express determination under the provisions of Rule 54(b) that the dismissal of the $500 claim was a final order, it is not a final order; it was not appealable to the Court of Appeals, and, therefore, is not in the proper posture to be the subject of a petition for a writ of certiorari.

This lack of a final order under Rule 54(b) was one of the grounds relied upon by respondent in its Motion to Dismiss before the Court of Appeals. The fact that the Motion to Dismiss was granted on other grounds does not detract from the validity of this ground.

The $5,000 claim remains in the District Court. There was no express determination of finality made by that Court with respect to the $500 claim. It is respectfully submitted that petitioner does not have an appealable order herein.

III

The Present Validity of the Civil Rights Act of 1875

Sections 1 and 2 of the Civil Rights Act of 1875 were held unconstitutional with respect to private intrastate racial discrimination in the *Civil Rights Cases*, 109 U.S. 3 (1883).

In *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913), this Court ruled that these provisions could not be applied to racial discrimination in interstate commerce. The rationale of the Court in *Butts* was that since Sections 1 and 2 were penal in

character and were intended by Congress to have uniform national application, the statute should be held wholly invalid rather than applied in some cases, and not in others.

Recently, in *United States* v. *Raines*, 362 U.S. 17 (1960), this Court expressly reaffirmed *Butts*, i.e., that Sections 1 and 2 of the Civil Rights Act of 1875 are wholly invalid.

In *Williams* v. *Hot Shoppes, Inc.*, 110 U.S. App. D.C. 358, 293 F. 2d 835, the United States Court of Appeals for the District of Columbia sat en banc to decide this very question. Although the Court split 7-2 on another question dealing with 42 U.S.C. § 1983, all nine judges agreed that Sections 1 and 2 of the Civil Rights Act of 1875 were now of "no present validity and appellant's claim under them was properly dismissed."

That these decisions support respondent's position and correctly reflect the law seems clear beyond doubt. In *Butts*, this Court held that Congress intended the Act to have uniform application and, as stated in *Raines*, "was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover."

In the present case, petitioner would have the Court resurrect the Act in a fraction of the cases it was originally designed to cover.[3] Petitioner would have it apply only to acts in which state action is allegedly

[3] Assuming, arguendo, that the Act was intended to cover action by persons other than the proprietors of inns, managers of theatres, etc., acting solely in a private capacity.

involved.[4] This Court has ruled on this very point of fractional application in *Butts*, and reaffirmed that ruling in *Raines*. The Act was not intended to stand as to some situations and not as to others. Respondent respectfully suggests that this question has now been fully answered in *Butts* and *Raines*, and that the petition for certiorari should be denied even if, arguendo, it has been timely filed and there was a final order.[5]

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[4] While respondent assumes, for the sake of the point, that state action is involved, actually no state action is present. The restaurant which allegedly discriminated against petitioner was privately owned, privately managed, and was not located in a building owned by the state, was not in a bus terminal, was not engaged in inter-state commerce and its only connection with the state was one of geography. The Complaint does not allege otherwise, but is based upon the theory that a restaurant located in a state which has a custom of segregation cannot lawfully discriminate because to do so would be to help the state enforce its custom of segregation. The validity of this theory awaits a test in the $5,000 claim now awaiting trial in this very case in the United States District Court for the District of Columbia.

[5] It should also be pointed out that the Civil Rights Act of 1875 refers to "inns", but not to restaurants. When petitioner herein earlier relied upon this Act, and tried to equate an "inn" with a "restaurant", the United States Court of Appeals for the Fourth Circuit, in *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 FN. 1 (1959) held:

> "1. Even if the Act of March 1, 1875, were valid, it would not support the plaintiff's case since it covers only inns, public conveyances and places of amusement. It has been held in Virginia, *Alpaugh* v. *Wolverton* 184 Va. 943, 36 S.E. 2d 906, in a case which did not involve race relations, that a restaurant owner is not an innkeeper charged with the common-law duty to serve everyone who applies. The Court said at page 948 of 184 Va., at page 908 of 36 S.E. 2d:
>
> 'A restaurant, on the other hand, is an establishment where meals and refreshments are served. 28 Am. Jur. Inn-

For the foregoing reasons, respondent requests the Court to deny certiorari.

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keepers, § 10, p. 545; 43 C.J.S., Innkeepers, § 1, subsec. b, p. 1132.

"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 Am. Jur., Innkeepers, § 120, p. 623; 43 C.J.S., Innkeepers, § 20 subsec. b, p. 1169. His rights and responsibilities are more like those of a shopkeeper. Davidson v. Chinese Republic Restaurant Co., 201 Mich. 389, 167 N.W. 967, 969 L.R.A. 1918E, 704. He is under no common-law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. Nance v. Mayflower Tavern, 106 Utah 517, 150 P. 2d 773, 776; Noble v. Higgins, 95 Misc. 328, 158 N.Y.S. 867, 868."

It is respectfully submitted, therefore, that the Act in question does not apply to the facts of this case, because the alleged discrimination took place in a restaurant, not an inn.